IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

—against—

LEO M. SHORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Table of Authorities

Cases: PAGE

United States Constitution:

Statutes: PAGE

Rules and Regulations:

Articles and Treatises:

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Opinions Below

The opinion of the District Court (App. E of the Petition, p. 26a*) was unreported. The opinion of the Court below (App. A, pp. 1a-19a) is reported at 565 F. 2d (2d Cir. 1977).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

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* Citations herein to pages of appendices are to each appendix of the Petition and will appear as follows: "App. ——, p. ——".

Questions Presented

1. When Petitioners have had a full and fair adjudication of issues in an action brought by the Securities and Exchange Commission, and been found, in that action, by both the District Court and Court of Appeals, to have intentionally violated Section 14(a) of the Securities Exchange Act of 1934, does the seventh amendment require that they be granted another trial, by a jury, to re-litigate the identical issues in the identical court?

2. Did the enlargement of the application of the doctrine of collateral estoppel, removing the requirement of mutuality, expressed by this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), a case decided after the decision of the Court of Appeals for the Fifth Circuit in *Rachal* v. *Hill,* 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971), effectively overrule *Rachal* and thereby resolve any possible conflict between the Second and Fifth Circuits on the issue of whether Petitioners must here be granted a jury trial?

3. Are Petitioners entitled to a jury trial in this action, on issues already determined in an action brought by the Securities and Exchange Commission, when they failed to preserve whatever jury rights they might have had in this action, by:

(a) failing to seek a jury trial in the action brought by the Securities and Exchange Commission, and

(b) failing to seek a stay of the trial in that action pending a trial to a jury in this action?

Constitutional Provision and Federal Rules Involved

Rule 1 of the Federal Rules of Civil Procedure provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

The pertinent provisions of the United States Constitution and the other pertinent Rules of the Federal Rules of Civil Procedure are set forth in the Petition at pp. 3 and 4.

Statement of the Case

This action was commenced in the United States District Court for the Southern District of New York on November 13, 1974, against Petitioners and twelve other defendants who were officers, directors and/or shareholders of Petitioner Parklane Hosiery Company, Inc. ("Parklane") as of the date of the merger described below. The action was certified, by Order dated May 2, 1975, as a class action on behalf of all Parklane shareholders on September 14, 1974, the record date in connection with said merger. The Complaint, as amended, (hereinafter the "Complaint") alleged violations of Sections 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law.

The action is based upon a false and misleading proxy statement dated September 24, 1974 (the "Proxy Statement") which the Complaint alleges fraudulently caused

a merger (the "Merger") in which the public shareholders of Parklane were bought out of Parklane. As a result of the Merger, Parklane was merged with New PLHC Corp., a company incorporated solely to act as a corporation to merge with Parklane. Prior to the Merger, the individual defendants owned 71.6% of the issued and outstanding shares of Parklane. They transferred these shares to New PLHC Corp. immediately prior to the Merger and, at such time, their shares became its only asset. In full payment for their Parklane shares, the public shareholders were paid, in the Merger, $2.00 per share cash, whereas the individual defendants received shares of New PLHC Corp. and the right to participate in its future business.

Plaintiff alleged in the Complaint that the Proxy Statement was false and misleading in that, *inter alia:*

(a) it made statements as to various reasons why Parklane would be converted to a privately-owned company when, in fact, the true undisclosed reason for its conversion was to aid Petitioner Herbert N. Somekh ("Somekh") in meeting his personal financial obligations;

(b) it made statements concerning the termination of negotiations with the Federal Reserve Board of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB when, in fact, the defendants failed to disclose the existence of on-going negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits; and

(c) it made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact the defendants failed to disclose

in the Proxy Statement that the two appraisers were not provided with sufficient information to prepare and provide a true and complete valuation of such stock.

Respondent further alleged that the distribution of the Proxy Statement was part of a fraudulent scheme giving rise to liability to the Respondent and other members of the class under Section 10(b) and the common law.

In May, 1976, the Securities and Exchange Commission ("SEC") commenced an action in the Southern District of New York against Petitioners alleging that the Proxy Statement was false and misleading (the "SEC action"). After trial therein, the District Court, finding intentional violations by Petitioners of the 1934 Act, held:

(a) "It is clear to me that the overriding purpose for the merger was to enable Somekh to repay his personal indebtedness. Had his finances been otherwise, the merger may never have occurred. There is not so much as a hint of Somekh's huge debts in the Proxy Statement. The non-disclosure [in the Proxy Statement] is clearly established." *Securities and Exchange Commission* v. *Parklane Hosiery Co., Inc.,* 422 F. Supp. 477, 482 (S.D.N.Y. 1976), *aff'd,* 558 F.2d 1083 (2d Cir. 1977).

(b) "I find that the October 4 conference between Somekh and the authorized representative of the FRB falls within the common usage of the term 'negotiation' [footnote omitted]. Thus, the unamended proxy material was false when it stated that 'there are no negotiations at present'." *Id.,* 422 F. Supp. at 483.

(c) "The failure to inform Thomson & McKinnon [one of the appraisers] of these facts and the failure to

disclose the defect in the appraisal in the Proxy Statement is beyond question." *Id.*, 422 F. Supp. at 484.

The District Court further held that these misstatements in, and omissions from, the Proxy Statement were material and intentional. *Id.*, 422 F. Supp. at 486-487.

On July 8, 1977, the Court of Appeals for the Second Circuit specifically affirmed each of these findings of the District Court in the SEC action. 558 F.2d at 1086-1087.

In the SEC action, Petitioners had a full and fair opportunity to, and did, litigate the accuracy of the Proxy Statement. Nowhere in the Petition or in their papers before the Court below or the District Court did Petitioners even hint that they did not receive a full and fair adjudication in the SEC action. After that adjudication, both the District Court and Court of Appeals found the Proxy Statement to be materially and intentionally misleading for the reasons alleged in the Complaint.

After the District Court decision in the SEC action, Respondent moved for partial summary judgment on liability based on the factual findings in the SEC action. The District Court denied Respondent's motion. App. E., p. 26(a). Respondent then moved, pursuant to 28 U.S.C. §1292(b) and Rule 5, Fed. R. App. P., for certification of a question for appeal. The District Court granted the motion and the Court below granted the petition for leave to appeal.

The Court below, relying on numerous decisions of this Court including, in particular, *Blonder-Tongue, supra,* and *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959), unanimously reversed the District Court's decision. In so deciding, the Court below found no constitutional requirement that " . . . a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the same issues of fact arising out of the same transaction." App. A, pp. 2a-3a.

On December 20, 1977, (a) the Court below denied Petitioners' motion for rehearing and (b) the Court of Appeals for the Second Circuit denied Petitioners' suggestion that the action be reheard *in banc.*

ARGUMENT

Petitioners, who have already been found to have intentionally violated the 1934 Act, are seeking here to relitigate the issues which have already been decided against them in the SEC action. Notwithstanding that decision, and after an opportunity for a full and fair judicial resolution of the issues upon which partial summary judgment was here sought, Petitioners contend that they are entitled to a second trial on those same issues, this time before a jury.

It is clear, based on the seventh amendment and numerous prior decisions of this Court, that Petitioners are not entitled to a second trial because the facts upon which Respondent seeks partial summary judgment have already been adjudicated, leaving nothing for a jury to decide. By removing the mutuality requirement in applying the doctrine of collateral estoppel, this Court, in *Blonder-Tongue, supra,* has precluded re-litigation of factual findings after a full and fair opportunity for their judicial resolution. Petitioners received that judicial resolution in the SEC action and cannot, therefore, re-litigate those findings in this action. To hold otherwise would not only be contrary to this Court's decision in *Blonder-Tongue* but would be

based, as was *Rachal,* on a completely erroneous analysis of *Beacon Theatres.*

Furthermore, acceptance of Petitioners' interpretation of the seventh amendment and the case law precedents, would, in the guise of preserving a non-existent jury right, allow a second trial, on the identical issues, to parties already found to have intentionally violated the 1934 Act. This would perforce lead to further congestion of the already over-crowded federal court calendars. Respondent does not contend that a jury trial right should be extinguished simply to clear up congested court dockets, but instead urges that a jury trial right should not be created to further overload those dockets.

Finally, Petitioners discuss the issue raised by the Court below in *dictum* (App. A, p. 14a), of their right, *vel non,* to a jury or an advisory jury in the trial of the SEC action. However, that question, regardless of its importance, is not before this Court. In any event, the record makes clear that Petitioners neither sought a jury or an advisory jury in the trial of the SEC action nor did they seek a stay of that action pending a determination of the instant action. It is respectfully submitted that by the failure of Petitioners to seek the relief in the SEC action, proposed by the Court below, they waived any jury trial rights which they may have had in this action. The question of jury trial rights of defendants against whom the SEC and private litigants have commenced suit should, if important enough to be heard at all by this Court, await an action in which the proper steps have been taken by a defendant to preserve its jury rights.

I.

Any Conflict Between the Second and Fifth Circuits on the Issue Here Presented Has Been Rendered Moot by This Court's Decision in *Blonder-Tongue* Which Effectively Overruled *Rachal*.

By its decision in *Blonder-Tongue, supra,* this Court, as admitted by Petitioners (Petition at p. 14) permitted the application of collateral estoppel in the absence of mutuality. The Court below stated:

> As Justice White observed in *Blonder-Tongue, supra,* the fundamental question is "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue," 402 U.S.a [*sic*] 328, a question which the Court answered in the negative. App. A, p. 14a, fn.4.

The decision in *Blonder-Tongue* effectively overrules *Rachal* and makes clear that once factual issues have been fully and fairly litigated, the doctrine of collateral estoppel precludes their re-litigation in an action commenced by one who was not a party to the first action. The underlying reasoning is simple—the facts have been determined by a judicial resolution and are no longer in dispute. A new trial would be a meaningless act since there would be no factual issues for a jury to decide.

There can be no question that the judicial resolution in the SEC action was full—it consisted of a three-day trial and an appeal to the Court of Appeals. Nor can the fairness of the adjudication in the SEC action be questioned. In fact, Petitioners have never questioned the fullness and fairness of the adjudication in the SEC action. The reasoning of *Blonder-Tongue,* therefore, precludes affording Peti-

tioners a second trial on the issues already decided against them. Furthermore, to the extent that foreseeability of the possible use of collateral estoppel in this action is a factor in determining whether application of estoppel principles would be unjust, see *The Evergreens* v. *Nunan,* 141 F.2d 927, 929 (2d Cir.), *cert. denied,* 323 U.S. 720 (1944), no unfairness exists because this action was begun prior to the commencement of the SEC action and Petitioners, being parties to two suits pending at the same time, were fully aware of the estoppel consequences.

Because there are no factual issues for jury determination in the instant case, it is readily distinguishable from the decision of this Court in *Dimick* v. *Schiedt,* 293 U.S. 474 (1935) relied upon by Petitioners. *Dimick* was an action brought to recover damages for a negligently caused personal injury. The jury returned a verdict in favor of plaintiff for the sum of $500. Plaintiff moved for a new trial on the grounds that the verdict was contrary to the weight of the evidence, that it was a compromise verdict, and that the damages allowed were inadequate. The trial court ordered a new trial upon the last named ground, unless defendant consented to an increase of the damages to the sum of $1500. Plaintiff's consent was neither required nor given. Defendant, however, consented to the increase and, in accordance with the order of the court, a denial of the motion for a new trial automatically followed. On plaintiff's appeal, the judgment was reversed, the court of appeals holding that the conditional order violated the seventh amendment in respect to the right of trial by jury.

In affirming the decision of the court of appeals in *Dimick,* this Court stated:

> With, perhaps, some exceptions, *trial by jury* has always been, and still is generally regarded as the normal preferable *mode of disposing of issues of fact*

> in civil cases at law . . . Maintenance of the *jury as a fact-finding body* is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Id.* at 485-486. (Emphasis added.)

A new jury trial was therefore ordered in *Dimick* so that factual issues upon which the claim at law was based could be decided by a jury. *Dimick* is completely inapplicable to the case at bar because, in Respondent's motion for partial summary judgment of liability, based on the factual findings in the SEC action, there are no issues for the jury as a "fact-finding body" to decide. The factual issues were decided in the SEC action, and *Blonder-Tongue* precludes their re-litigation here.

II.

The Decision Below Is Clearly Correct as it Properly Applies the Reasoning of *Beacon Theatres* and Its Progeny.

Even if this Court does not view *Blonder-Tongue* as resolving the conflict between the Second and Fifth Circuits, the decision of the Court below is clearly correct. The Court below properly rejected Petitioners' arguments which were primarily grounded on their erroneous reading of the decision of this Court in *Beacon Theatres* and its equally erroneous application by the Court of Appeals for the Fifth Circuit in *Rachal.*

Rachal completely misinterprets *Beacon Theatres.* In *Beacon Theatres,* this Court ordered that a legal counterclaim be tried by a jury, prior to the trial of an equitable claim by the Court, in an action in which both claims would

be resolved by the determination of common factual issues. It is respectfully submitted that in so deciding, this Court assumed that, if the equitable claim were adjudicated by the court first, collateral estoppel would preclude a subsequent jury determination of the issues decided by the court. As stated in Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill*, 85 Harv. L. Rev. 442 (1971):

> *Beacon Theatres* thus indicated that whenever principles of former adjudication or law of the case might preclude jury trial on an issue previously litigated before a judge in the same proceeding, the trial judge must, in the absence of exceptional circumstances, order the trial of issues within that proceeding to assure that foreclosure does not occur. But *Beacon Theatres* did not imply that principles of former adjudication should themselves be changed under the influence of the seventh amendment. *Rachal* takes exactly the opposite tack from *Beacon Theatres*, concluding that seventh amendment considerations do influence the application of these principles when reordering is impossible, as it was in *Rachal* because of the separateness of the two proceedings.
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> • • •
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> No procedural reforms—merger of law and equity, declaratory judgment, or anything else—can be said to have affected the equitable character of the relief sought by the SEC in the initial proceeding or to have given the defendants a right to a jury in that action. Instead, *Rachal* raises the wholly different question whether the seventh amendment requires re-litigation of an issue already decided adversely to the party who now asserts a jury trial right. Is there really an anomaly, as the Fifth Circuit seemed to think, in concluding that a jury must be given on an issue not yet adjudicated, but that an issue need not be *relitigated* once it has been decided by the court sitting alone? *Id.* at 446-447. (Emphasis in original)

Moreover, the authors claim that *Rachal's* reliance on other Supreme Court decisions, *i.e., Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469 (1962), and *Scott* v. *Neely*, 140 U.S. 106 (1891),* is equally misplaced. Shapiro and Coquillette, 85 Harv. L. Rev. at 447-448.

In short, *Beacon Theatres* states that where parties join legal and equitable claims arising from the same transaction, the legal claim must be adjudicated first by a jury to preserve the jury right as to that claim. As the Court below correctly stated:

> Thus *Beacon Theatres* simply asserts that where parties join legal and equitable claims arising out of the same transaction, the court must schedule the sequence of trial to protect a party's constitutional right to a jury trial. However, we do not view the decision as compelling the result reached in *Rachal*. If anything, *Beacon Theatres* implicitly confirms the long-accepted principle that a non-jury adjudication of issues asserted in an equitable claim will collaterally estop a later jury trial of the same issues presented by the same party in a legal claim. Had it not been for that basic assumption the Supreme Court would not have been concerned about the order in which the legal and equitable claims were to be tried, since the defendant would then have been guaranteed a jury trial of the counterclaim regardless of the outcome of the equitable claim. App. A, pp. 11a-12a.

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* *Scott* v. *Neely, supra*, although not directly relied upon by the *Rachal* Court, was cited within the quotations from *Beacon Theatres* which were relied upon by *Rachal*.

And as recently stated by Judge Friendly, writing for a unanimous Court in *SEC* v. *Commonwealth Chemical Securities, Inc.*, CCH Fed. Sec. L. Rep. [Current Transfer Binder] ¶96,351 at 93, 194 (2d Cir. 1978):

> [T]he holding in *Beacon Theatres* v. *Westover,* [citation omitted], the *fons et origo* of modern concern over the interplay between the right to jury trial suits at common law and the lack of such a right in suits in equity, assumed that there would be no jury trial on the plaintiff's claim for an injunction and a declaratory judgment and that a judgment for the plaintiff on these claims would work as a collateral estoppel on the defendant's counterclaim for damages.

Thus, *Beacon Theatres* makes clear that the seventh amendment does not give Petitioners the right to a jury trial on factual issues already determined against them. To argue that the seventh amendment precludes the application of the doctrine of collateral estoppel to the instant case, stands *Beacon Theatres* on its head. The decision of the Court of Appeals for the Fifth Circuit in *Rachal* is so improperly reasoned that it should not disturb the ruling of the Court below.

III.

There Is No Important Question of Law Presented.

A. *Petitioners Have Waived Whatever Right to Jury Trial They May Have Had.*

Petitioners have raised the question, referred to in *dictum* by the Court below (App. A, at p. 14a) as to the right of a defendant to a jury trial in an action in which the SEC seeks injunctive relief. Whatever the import of that question, it is not the question before this Court. This

Court is not being asked to determine whether a party is entitled to a jury in an action in which the relief sought is equitable; the question is simply whether once facts in issue have been judicially determined, is the party against whom they have been determined entitled to re-litigate them. This Court replied in the negative in *Blonder-Tongue,* as did the Court below which relied on *Blonder-Tongue* and *Beacon Theatres* and its progeny.

Furthermore, as the Court below stated, by failing to seek a jury or an advisory jury in the SEC action, and by failing to seek a stay of the trial in that action pending a trial in this action, Petitioners waived whatever jury rights they may have had in this action. They did so by failing to take the proper steps to preserve any such rights by their conduct in the SEC action. Should this Court wish to address the question of jury trial rights of defendants situated in a position similar to that of Petitioners, it is respectfully submitted that such question should be resolved in an action in which the defendants have taken the necessary steps to protect their rights to trial by jury.

B. *Petitioners' Contention That All Claims at Law Must Be Tried by a Jury Is Erroneous.*

What Petitioners are apparently claiming is that the seventh amendment requires that all claims at law reach, and be decided by, a jury. Obviously, there is no such requirement. It is well established, for example, that a court has full constitutional power to withdraw a case from a jury under Rule 50(a) and (b) of the Federal Rules of Civil Procedure and that such action does not violate a party's seventh amendment rights. See, *e.g.,* Wright & Miller, *Federal Practice & Procedure:* Civil §2522. The instant motion is simply one which has been withdrawn from a jury as there are no facts for it to decide. As the

Court of Appeals for the Second Circuit stated in a case in which a directed verdict would have been required even if there had been a jury trial: "There is no constitutional right to have twelve men sit idle and functionless in a jury-box." *United States* v. *243.22 Acres of Land,* 129 F.2d 678, 684 (2d Cir. 1942), *cert. denied,* 317 U.S. 698 (1943). That would be precisely the role of a jury in the decision of the instant motion for partial summary judgment.

To grant Petitioners a jury trial would, as the Court below noted:

> . . . violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the just, speedy and inexpensive determination of every action, Rule 1, F.R. Civ. P. App. A, p. 14a. [Footnotes omitted].

There is no reason to permit Petitioners to again litigate the question of whether they intentionally violated the 1934 Act—an issue which has already been decided against them in the United States District Court for the Southern District of New York and the Court of Appeals for the Second Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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